

1 IN THE UNITED STATES DISTRICT COURT

2 FOR THE DISTRICT OF OREGON

3 UNITED STATES OF AMERICA, )  
4 Plaintiff, ) No. 3:12-cr-00659-MO-1  
5 v. )  
6 REAZ QADIR KHAN, ) December 19, 2014  
7 Defendant. ) Portland, Oregon  
8 \_\_\_\_\_ )

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15 **Status Conference**

16 TRANSCRIPT OF PROCEEDINGS

17 BEFORE THE HONORABLE MICHAEL W. MOSMAN

18 UNITED STATES DISTRICT COURT JUDGE  
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APPEARANCES

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1 (P R O C E E D I N G S)

2 THE COURT: Go ahead, sir.

3 MR. KNIGHT: Good morning, Your Honor. We are  
4 present in the matter of the United States v. Reaz Khan.  
5 This is Case No. 12-cr-659. Ethan Knight and Charles  
6 Gorder, appearing on behalf of the United States; Amy Baggio  
7 and Ryan O'Connor are appearing with Mr. Khan, who is  
8 present and out of custody. And we are here today, Your  
9 Honor, for a scheduling conference in Mr. Khan's case.

10 THE COURT: Thank you.

11 Good morning.

12 MS. BAGGIO: Good morning, Judge Mosman.

13 THE COURT: I have the second proposed litigation  
14 schedule, and so given that this was filed just a little  
15 while ago, is that still the schedule you're proposing?

16 MS. BAGGIO: No, sir.

17 THE COURT: Tell me about the change.

18 MS. BAGGIO: Thank you, sir.

19 Your Honor, I have two big-picture changes to the  
20 schedule. The first is that I am requesting a one-month  
21 proposed continuance of the proposed deadlines of rounds 4  
22 and 5. And I can explain why that is necessary if the Court  
23 would like additional information. But I did confer with  
24 the government. They have no objection to a one-month  
25 continuance of the deadlines as to round 4, but they do

1 object to a one-month continuance of round 5 because of the  
2 implications it has on further scheduling.

3 THE COURT: Go ahead and explain.

4 MS. BAGGIO: Thank you, sir.

5 Your Honor, as to round 4, there are a couple of  
6 different things that are at play here: one, there have  
7 been some intervening circumstances with regard to counsel  
8 on the case, and I'm going to be taking over the round 4C --  
9 I'm sorry, it's the motion to compel. I need some time to  
10 be able to do that, Your Honor.

11 With regard to the jury instructions that are also  
12 set forth in round 4, we would -- we understood, pursuant to  
13 the Court's minute order, which appears at court record 156,  
14 my understanding was that the Court was going to issue an  
15 opinion on the defendant's motion to dismiss the indictment,  
16 and our position -- and I believe the government would agree  
17 with this -- we think both sides would benefit from the  
18 Court's opinion about the conspiracy, as set forth in the  
19 indictment, and that that would help us be in a better  
20 position to argue about the proper jury instructions with  
21 regard to conspiracy, which is one of the round 4 motions.

22 THE COURT: All right.

23 MS. BAGGIO: And then, Your Honor, with regard to  
24 round 5, these are the surveillance motions, and we have  
25 made great progress on these in terms of constitutional

1 facial challenges, but I simply am finding that I need more  
2 time to work through what we discussed as sort of an  
3 as-applied challenge, based on the discovery in this case,  
4 as well as working through the statutory violations. And  
5 therefore I'm asking for an additional month to be able to  
6 do that on round 5.

7 THE COURT: Between 5A through G, which are facial  
8 and which are as-applied -- or which are -- which are the  
9 facial challenges, I guess? Everything else is either  
10 as-applied or something else.

11 MS. BAGGIO: Or statutory, yes, Your Honor. We  
12 are going to have both aspects to all of those rounds, Your  
13 Honor.

14 THE COURT: All right.

15 And I've received pro hac vice applications from  
16 the ACLU. Which motions are they going to assist on and  
17 represent Mr. Khan? I granted those. Where will they be  
18 assisting?

19 MS. BAGGIO: Thank you, Your Honor.

20 Specifically with the FISA Amendments Act  
21 litigation. However, we have discussed the fact that they  
22 do have additional experience on some of the other foreign  
23 intelligence areas, and so they will be consulting with me  
24 on those, but the appearance and the specific briefing I  
25 expect will be with regard to the 702 challenge.

1 THE COURT: Does that spill over into round 6 or  
2 not?

3 MS. BAGGIO: No, sir. I believe that's all  
4 contained within round 5.

5 May I add something to the 702, though, Your  
6 Honor? Because of my familiarity with the record, I will be  
7 working with the ACLU with regard to the as-applied and  
8 statutory challenges.

9 THE COURT: All right. You would like an  
10 extension for round 4 for a variety of reasons, perhaps the  
11 principal of which is that for 4B, you're taking over for  
12 Mr. Ransom yourself now?

13 MS. BAGGIO: That is true as to 4B, that's  
14 correct.

15 THE COURT: And for round 5, you'd like a  
16 one-month extension, including of the -- of course of the  
17 hearing date.

18 And your concern, then, Mr. Knight and Mr. Gorder,  
19 is that the round 5 extension makes the current trial date  
20 unlikely, or what is your concern?

21 MR. KNIGHT: That's correct, Your Honor.  
22 Necessarily by moving at least the hearing date one month,  
23 if we're to look at the proposed schedule, that would take a  
24 hearing to the end of July, when it's at least contemplated  
25 right now that the trial documents would be due. And we

1 would expect an order to follow -- an order and opinion to  
2 follow sometime after the hearing. And I think both  
3 parties, in all likelihood, would want an order or opinion  
4 on the FISA issue prior to submission of the trial  
5 documents. We get into a situation where we're then talking  
6 about moving the trial documents to the pretrial date, and  
7 then perhaps moving the trial date further than we  
8 contemplated. Our concern is that if we begin to chip away  
9 at some of these dates with long time frames, we talk about  
10 2016 for a trial date, and we have concerns about pushing  
11 the case out that far.

12 THE COURT: What are you currently thinking the  
13 schedule set forth in the second proposed litigation  
14 schedule chart would do for the trial date? What were you  
15 thinking the trial date was going to end up being?

16 MR. KNIGHT: Well, I think it's our hope that it  
17 be sometime in the fall, perhaps November, of course,  
18 depending on the Court's schedule.

19 THE COURT: Is it your perception that the  
20 one-month extension you're asking for makes a November trial  
21 not likely?

22 MS. BAGGIO: I think it would be possible to still  
23 meet the November trial, Your Honor. I think if not  
24 November, the beginning of December would be reasonable,  
25 because as I had worked through the dates, I thought that

1 with our proposed schedule, we could begin trial November  
2 the 2nd, and if we were to shift everything by a month, that  
3 would put us the beginning of December.

4 THE COURT: So let's walk through that just for a  
5 minute.

6 If I granted your request, then we'd be holding a  
7 hearing on round 5 in late July, right?

8 MS. BAGGIO: That's correct, Your Honor.

9 THE COURT: And what, if anything, does that do to  
10 the round 6 motions in limine?

11 MS. BAGGIO: I don't believe that has any impact  
12 on that.

13 THE COURT: They're independent?

14 MS. BAGGIO: That's correct.

15 THE COURT: Trial evidence is what we're talking  
16 about with round 6?

17 MS. BAGGIO: That's correct.

18 THE COURT: So at least on the motions in limine.  
19 And then the constitutional motions, also  
20 unaffected?

21 MS. BAGGIO: Correct.

22 THE COURT: So that's round 6.  
23 Round 7 also -- at least 7A runs independent,  
24 right?

25 MS. BAGGIO: I see no impact on round 7, Your



1 Honor.

2 THE COURT: Round 7 unchanged.

3 So what you're really talking about is trial memo,  
4 expert disclosures and the like, and you'd want -- you'd  
5 want it -- I guess I could see the importance of knowing  
6 something about round 5, but what really of great importance  
7 is it to know the answer to the statutory issues, the FISA  
8 issues, when you're putting together witness lists, expert  
9 disclosures and the like?

10 MR. KNIGHT: I guess only insofar as it forms what  
11 evidence may be admissible or the government may be  
12 permitted to offer at trial. And I analogized it to a  
13 motion to suppress, where the Court may rule on the  
14 admissibility of certain pieces of evidence, depending on  
15 how the motion is fashioned.

16 THE COURT: Since there are various authorities  
17 for the evidence, some authorities may result in suppression  
18 and some not, and that would have kind of a patchwork effect  
19 on your --

20 MR. KNIGHT: That's right, both insofar as the  
21 admissibility and the foundation of certain pieces of  
22 evidence that may be offered.

23 THE COURT: All right. So if we held a hearing on  
24 round 5 in late July, I guess there's a couple of ways this  
25 can go. On the one hand, I'm intimately familiar with these

1 issues already. So in terms of a bare answer, I think we'd  
2 be able to have a lengthy hearing and a discussion, I'd hear  
3 your arguments, and fairly soon you've have an answer.

4 My impression -- I haven't looked at this closely,  
5 but my impression is that we're sort of at the tail end of a  
6 number of these cases taking a look at this issue around the  
7 country, right?

8 MS. BAGGIO: Yes, Your Honor.

9 THE COURT: Fifth Circuit, a couple in California,  
10 the district court in D.C., elsewhere, right?

11 MS. BAGGIO: This issue with regard to 702  
12 specifically, Your Honor, or --

13 THE COURT: Yes. 702 specifically and related  
14 statutory challenges.

15 MS. BAGGIO: Yes, sir.

16 THE COURT: And so if I'm right about that, you  
17 mentioned that you'd want an opinion, and then that would be  
18 something you'd use in handling the round 8A trial  
19 documents. I guess I think that's unlikely if I don't have  
20 anything to add. If I end up -- there's two bodies of case  
21 law, well-written opinions on both side. Two of them are  
22 Court of Appeals cases, I think, aren't they?

23 MS. BAGGIO: Yes, sir.

24 THE COURT: So well-written opinions on both  
25 sides, and I end up agreeing with one side or the other and

1 have nothing new to say, then I'm not sure I'd write an  
2 opinion.

3 I'm kind of thinking out loud here in terms of how  
4 long we really need after that hearing before you could  
5 begin filing trial memos, expert disclosures and the like.

6 MS. BAGGIO: May I add something, Your Honor?

7 THE COURT: Yes.

8 MS. BAGGIO: The other thing I think is in play  
9 here is when we'll be arguing what we're referring to as  
10 as-applied challenges or potential statutory violations. A  
11 piece of that will be our request for access to the actual  
12 orders and opinions. We recognize that courts haven't  
13 heretofore allowed defense counsel access to that  
14 information, but that will be a part of our presentation,  
15 that we'll be seeking access to that information. And if  
16 the Court were to be inclined to grant us access, then that  
17 would be, I think, another round of litigation there.

18 And if I could add that --

19 THE COURT: The first time you'd be presenting  
20 that argument would be late July?

21 MS. BAGGIO: That would be part of our motions,  
22 Your Honor. So the way we have them structured is our  
23 constitutionality challenges, our as-applied and statutory  
24 challenges -- or statutory violations, rather, and a piece  
25 of that, the way we have them structured is we've done the

1 best we can to argue this, we ask the Court to consider  
2 these issues that we've raised in this motion, but we  
3 believe that this showing establishes the need for defense  
4 counsel to have actual access to the opinions and -- I'm  
5 sorry, orders and applications so that we can more  
6 thoroughly argue them on behalf of Mr. Khan.

7 THE COURT: I guess what I'm asking is, so you're  
8 right, that if I grant that, that would delay it even more  
9 than a month, but that's not a request you're prepared to  
10 make earlier than the other motions and memos in round 5?

11 MS. BAGGIO: Your Honor, I believe, as I read the  
12 law, that the Court has to do the independent review first,  
13 and only after the Court does the independent review does  
14 the Court then have the ability -- this is under the Seventh  
15 Circuit *Daoud* case, to decide that defense counsel access is  
16 necessary.

17 THE COURT: Well, we'll cross that bridge when we  
18 get to it, then.

19 For now, let's assume we hold a hearing in late  
20 July, and that you get an answer fairly soon -- an answer.  
21 You'd get an opinion in, say, early September, if that's the  
22 route it took. We'd have a November trial date, a November  
23 pretrial conference, and something like 30 days prior to  
24 that, documents start coming due in October.

25 So if you had -- if you had an answer in August

1 and an opinion in September, wouldn't you be ready to start  
2 filing trial documents in early October for a mid November  
3 trial?

4 MS. BAGGIO: Yes, and -- but if I could tweak that  
5 one more level, Your Honor. In speaking with Mr. Knight  
6 about the most efficient way for us to proceed, we expect  
7 that both parties will be using expert witnesses, and we  
8 expect there may be robust litigation as to the  
9 admissibility or any limits on expert testimony.

10 And what we thought might make things more  
11 efficient is if we could have an earlier than trial  
12 documents deadline for expert disclosures so we could do a  
13 separate round of *Daubert* litigation as necessary as to  
14 experts, and have the Court's ruling on those experts before  
15 we submit our trial documents, because, of course, that  
16 would have an impact on the way we try our cases.

17 THE COURT: I agree.

18 MS. BAGGIO: So, Your Honor, I think we can do  
19 that really independently of what happens with round 5  
20 motions as well. So --

21 THE COURT: Let me say this. I think that's  
22 correct, and there -- the ideal is that you don't do  
23 anything that may result in unnecessary work, but that's  
24 only an ideal. I mean, it happens all the time that people,  
25 you know, prepare for an expert hearing, and then after

1 they've prepared, they learn that, you know, one piece of  
2 their expert testimony isn't going to be necessary or  
3 allowed or something like that.

4           So there's no magic to a particular trial date,  
5 but there is, I think, an interest both for the defendant  
6 and of course under the Constitution and statutes for the  
7 public to have a speedy trial. I am interested in making it  
8 happen this year, and I think it's probably not in anyone's  
9 interest -- certainly not your client's -- to have it happen  
10 right in the middle of December. I don't want a distracted  
11 jury. So we're probably talking about, at the latest, the  
12 later or really even preferably early November.

13           A three-week trial is still what everyone thinks?

14           MS. BAGGIO: Yes, Your Honor.

15           THE COURT: So the ideal -- the ideal trial time  
16 for the jury, to make sure we don't have a jury that's  
17 hurrying to get to Thanksgiving or worried about Christmas,  
18 the ideal time is the start of November. And then we work  
19 backwards and have a pretrial conference late October, those  
20 documents coming due all through October, probably a *Daubert*  
21 hearing late September, something like that.

22           And that probably means that you're at least  
23 thinking about maybe drafting things regarding the *Daubert*  
24 hearing before you have an opinion from me. But keep in  
25 mind you'll have almost certainly an answer from me orally,

1 where you'll know where things are going. All I do with an  
2 opinion is take my sort of stumbling words in court and try  
3 and make them pretty. So I think you'll have time. If we  
4 hold a late July hearing, you'll know what you need to know  
5 and be ready for things to happen in September, October and  
6 November.

7 So I appreciate that -- the position you're in  
8 now, although I intend to appoint a replacement for  
9 Mr. Ransom, means that right now you're under the gun for  
10 some of these deadlines, and in any event, the impact of my  
11 ruling requiring you to challenge a number of authorities,  
12 I'm not sure how many of them are truly necessary, means  
13 that I put extra work on you, and I'm sympathetic to that.  
14 And so I'm going to grant your request for that delay, and  
15 we'll now try to pick dates that sort of follow what I just  
16 gave as general ideas or placeholders.

17 So I grant a one-month delay of the schedule set  
18 forth in the second proposed litigation schedule.

19 Dawn or Elizabeth, do you know a docket number on  
20 this?

21 THE CLERK: 160.

22 THE COURT: 60?

23 THE CLERK: 160.

24 THE COURT: 160. Thank you.

25 So I'm talking about 160.

1           And Ms. Stephens, I'm going to go through those,  
2           and if you'll just confirm that the dates I'm about to say  
3           are weekdays.

4           THE CLERK:   Yes.

5           THE COURT:   So round 4 currently has a motion due  
6           January 20. That would make that February 20th, which is a  
7           weekday.

8           The response, March 9, the reply March 23, and  
9           then hearing April 16.

10          THE CLERK:   Clarification. You have time  
11          available April 21st from 10:00 a.m. to 12:00 p.m.  
12          April 16th, this courtroom will be used for Nats hearings.

13          THE COURT:   Is the schedule otherwise open that  
14          day?

15          THE CLERK:   Yes.

16          THE COURT:   All right. Let's keep that date and  
17          we'll be in a different courtroom.

18          THE CLERK:   10:00 a.m. to 12:00 p.m.?

19          THE COURT:   10:00 a.m. to 12:00 p.m. April 16th  
20          for the hearing on what's described in docket 160 as  
21          round 4.

22          Do we need to do anything with round 3?

23          MS. BAGGIO:   I don't believe so, Your Honor. We  
24          had requested that the Court would carry a decision on the  
25          mens rea jury instruction so that it could be discussed



1 along with round 4C, which are the pretrial instructions  
2 regarding conspiracy and the available statutory maximums  
3 based on the amendment.

4 THE COURT: All right. That's fine.

5 Round 5, the motion would then be due -- it was  
6 January 28th, so that becomes February 28th.

7 THE CLERK: Clarification for the clerk. Back on  
8 round 3, March 16th, we have the *Daubert* hearing originally  
9 set from 9:00 a.m. to 11:00 a.m., and we have other criminal  
10 matters set at the 11:00 hour. Could we reset from 10:00 to  
11 12:00 to 9:00 to 11:00?

12 MS. BAGGIO: Your Honor, I think that that  
13 proposed round 3 argument deadline would then become the  
14 April 16th from 10:00 to 12:00. That would join that other  
15 round 4 motions. I misspoke when I said we don't need to do  
16 anything with 3.

17 THE COURT: So we'll take that hearing and cancel  
18 it on the date it was scheduled and add it to the April  
19 setting.

20 MS. BAGGIO: Yes, sir.

21 THE COURT: Does that sound right, Mr. Knight?

22 MR. KNIGHT: Yes, that's right.

23 THE COURT: That's what we'll do. Then turning to  
24 round 5, the motion would now be due February 28th. Again,  
25 is that a weekday?

1 THE CLERK: It is not.

2 THE COURT: The next weekday?

3 THE CLERK: Would be March 2nd, or Friday,  
4 February 27th.

5 THE COURT: February 28th -- you said Friday is  
6 what day?

7 THE CLERK: Friday is February 27th.

8 THE COURT: All right. Let's make it Friday,  
9 then, as the due date.

10 The response had a fair gap there. That's still  
11 the gap we need between them?

12 MR. GORDER: Yes, Your Honor.

13 THE COURT: So that's May, approximately, 29th?

14 THE CLERK: Correct.

15 THE COURT: May 29th, then.

16 The reply, June 27th.

17 THE CLERK: The date would either be Friday,  
18 June 26th, or Monday, June 29th.

19 THE COURT: So make that Monday, June 29th.

20 And the hearing would be, if we could, July 29th.

21 THE CLERK: We have a trial set that date. We do  
22 have time available Monday, July 27th, at 3:00 p.m. to  
23 5:00 p.m., or in the morning, 10:00 to 12:00.

24 THE COURT: We'll take both blocks of time and set  
25 for it that Monday.

1           Then if I understood correctly, round 6 would  
2 proceed in the schedule set out in docket 160; is that  
3 right?

4           MS. BAGGIO: Yes, Your Honor.

5           THE COURT: And same with round 7?

6           MS. BAGGIO: Yes, sir.

7           THE CLERK: The hearing time of June 1st will not  
8 work for the Court. You are not in the office at that time.

9           We have time available Friday, May 29th.

10          THE COURT: Does that work for all of you?

11          MS. BAGGIO: It works for the defense, Your Honor.

12          MR. KNIGHT: It works for the government. Thank  
13 you.

14          THE COURT: That will be the new date for round 6  
15 hearing.

16          Round 7?

17          THE CLERK: How much time do you need for that  
18 hearing?

19          MS. BAGGIO: Round 6?

20          THE CLERK: I'm sorry, yes. Round 6.

21          MS. BAGGIO: I would say two hours probably.

22          THE COURT: Minimum?

23          MS. BAGGIO: Yes.

24          THE COURT: This is when the ACLU is here?

25          MS. BAGGIO: No. We're talking about round 6.

1 This would be the motions in limine -- are we talking about  
2 round 6?

3 THE COURT: I'm sorry, I'm on the wrong page.  
4 There we go.

5 MS. BAGGIO: Potential testimony as to 6A, but  
6 limited, and pure legal argument on 6B and 6C.

7 THE COURT: All right.

8 THE CLERK: We have time available 10:00 a.m.  
9 through 12:00 p.m.

10 THE COURT: That's fine.

11 All right. That completes round 6.

12 Then round 7, also same dates, correct?

13 MS. BAGGIO: Yes, Your Honor.

14 THE COURT: July 6th. Is that still available,  
15 Ms. Stephens?

16 THE CLERK: It is, and we have a full day. Would  
17 you like to block the entire day out?

18 THE COURT: We'll start with a couple hours,  
19 change it as we get closer if we need to.

20 Any testimony on round 7?

21 MR. GORDER: Your Honor, could I just ask -- and I  
22 don't know, the 4th of July is a Saturday, so it would be a  
23 federal holiday either on Friday or Monday. I'm not sure  
24 which one it is.

25 THE CLERK: It's on Friday.

1 MS. BAGGIO: I believe it's the 3rd is the federal  
2 holiday.

3 MR. GORDER: So the 6th would be fine.

4 THE COURT: All right. And how long a hearing, do  
5 you think, Mr. Gorder, on round 7?

6 MR. GORDER: Two hours, Your Honor.

7 THE COURT: That sound about right?

8 MS. BAGGIO: I think so, Your Honor. We would  
9 potentially have testimony as to round 7A, but it would be  
10 relatively limited. I think two hours would be fine.

11 THE COURT: All right.

12 THE CLERK: We have time available 10:00 a.m. to  
13 12:00 p.m.

14 THE COURT: That's fine.

15 All right. And then we'll set the *Daubert*  
16 hearing, and then work backwards from that to talk about  
17 exchanges. So I think we talked about a *Daubert* hearing in  
18 September, mid September to late September somewhere.

19 Do you have a suggested time for that,  
20 Ms. Stephens?

21 THE CLERK: We have time available both Monday the  
22 14th and Tuesday the 15th.

23 THE COURT: Do either of those dates work for  
24 government counsel?

25 MR. KNIGHT: Provisionally, yes. Obviously, we

1 need to confer with our experts to figure if they're  
2 available.

3 THE COURT: Same answer?

4 MS. BAGGIO: Your Honor, I would ask if it would  
5 be possible if we could do it the week of the 5th, just to  
6 allow a little bit more time. If we're talking about the  
7 trial starting November the 2nd, then we're coming up on a  
8 pretrial conference deadline.

9 THE COURT: I'm fine with that. The only issue  
10 would be you'd have to hustle to exchange your expert  
11 reports and -- prepare and exchange your expert reports  
12 after our late July hearing. I'm not sure how much they  
13 turn on that hearing.

14 MS. BAGGIO: I don't expect that they would to any  
15 extent, other than the possibility of -- I don't think for  
16 *Daubert* purposes it would have an impact.

17 THE COURT: Are yours principally cultural  
18 experts? What sort of experts?

19 MS. BAGGIO: Yes, sir.

20 THE COURT: How about the government?

21 MR. GORDER: Again, Your Honor, I don't think,  
22 absent total suppression of the evidence, it would affect  
23 our expert testimony either.

24 THE COURT: What sort of expert testimony are we  
25 talking about?

1 MR. GORDER: Well, we're going to have an expert  
2 on some of the terrorist issues in the case, Pakistan and  
3 that sort of thing.

4 THE COURT: All right. Well, those do sound like  
5 they're independent of the July briefing and hearing.

6 So the week of the 5th is fine if I'm available,  
7 Ms. Stephens. Is there a date that week?

8 THE CLERK: Monday the 7th is Labor Day. We have  
9 time available Tuesday the 8th, Wednesday the 9th, 10th, or  
10 11th.

11 MS. BAGGIO: Are we talking about September?

12 THE CLERK: September 2015, yes.

13 THE COURT: Do any of those dates work for  
14 government counsel?

15 MR. KNIGHT: The 9th, Your Honor.

16 THE COURT: Ms. Baggio, does the 9th work?

17 MS. BAGGIO: And this is for the hearing?

18 THE COURT: Yes.

19 MS. BAGGIO: Yes.

20 THE CLERK: How long?

21 MS. BAGGIO: I expect that to be a significant  
22 hearing, Your Honor.

23 MR. KNIGHT: I would think at least a day,  
24 depending on how many --

25 THE COURT: All right. I'll block out that day.

1 Is the 9th a Wednesday? Thursday?

2 THE CLERK: The 9th is a Wednesday and we also  
3 have time to break out on Thursday, the 10th.

4 THE COURT: Don't even tell them we have that  
5 available.

6 THE CLERK: We don't.

7 THE COURT: Otherwise they'll use it.

8 So that just means sometime in advance of the  
9 hearing, you'll have exchanged expert reports.

10 When can the government do that with regard to its  
11 experts, giving your opponent time to assimilate what you've  
12 given before the hearing?

13 MR. GORDER: How about July 15th, Your Honor?

14 THE COURT: Thank you.

15 Will something like that work for your experts  
16 also?

17 MS. BAGGIO: Yes, I believe so, Your Honor.

18 THE COURT: Simultaneous disclosure. These aren't  
19 experts who are rebutting each other, they're just your own  
20 experts?

21 MS. BAGGIO: There may be some rebutting of each  
22 other, but that's not the primary role, I don't believe,  
23 Your Honor.

24 THE COURT: So July 15th, you'll exchange your  
25 expert reports, and then we'll hold a *Daubert* hearing on the



1 date we just discussed, the 9th of September.

2 MS. BAGGIO: And, Your Honor, would you like to  
3 schedule actual briefing in between for a *Daubert* motion and  
4 response and reply?

5 THE COURT: Yes. So if you have them on the 15th,  
6 you can't really start briefing until you have those, then  
7 you need a couple weeks to read them and be ready to start  
8 your simultaneous briefing?

9 MS. BAGGIO: I would ask for until August 17th. I  
10 think it's going to be pretty heavy lifting with this one,  
11 Your Honor. So I would request a month to be able to file.

12 THE COURT: Well, then we won't have time for  
13 replies. It will just be a quick challenge running each  
14 direction, each of you challenging the other's experts, and  
15 then a response right before the hearing.

16 MS. BAGGIO: If that would be permissible. If the  
17 Court wants me to shave off a month, if the Court thinks it  
18 would benefit from further briefing in terms of a round of  
19 responses and replies, we could do that earlier.

20 THE COURT: Replies are often helpful, but less so  
21 if we're holding a hearing. I don't always know that we're  
22 going to hold a hearing, but here I'm sure we will, so let's  
23 cut off the replies so that you can make your initial  
24 motions and memos as comprehensive as possible.

25 MS. BAGGIO: Thank you.

1 THE COURT: That's a weekday, Ms. Stephens?

2 THE CLERK: Yes, August 17th.

3 THE COURT: So your -- each of your challenges to  
4 your opponent's experts -- that is, those motions and  
5 memos -- are due August 17th.

6 And then just towards the end of the month, it  
7 won't be a full two weeks because we have a hearing, but  
8 maybe -- what's the 25th? Is that a weekday?

9 THE CLERK: The 25th of August is a Tuesday.

10 THE COURT: That's fast, but of course I need time  
11 to read these responses before the hearing. So your  
12 responses will be due the 25th of August.

13 Then we have the hearing date. Now we'll set the  
14 trial date and a pretrial conference date.

15 So I'd like to start at the very first part of  
16 November, the first Tuesday of November.

17 THE CLERK: You want to start on a Monday or do  
18 you want to start on a Tuesday?

19 THE COURT: A Tuesday.

20 (The Court and the clerk have a discussion off the  
21 record.)

22 THE COURT: All right. So we'll start trial in  
23 this case November 3rd, 2015 -- that's a Tuesday -- at  
24 9:00 a.m. We'll hold a brief meeting the day before,  
25 November 2nd, to go over any last-minute issues and talk

1 about the trial, 10:00 the 2nd.

2 The pretrial conference will be the week of -- we  
3 may want to make it almost two weeks before.

4 THE CLERK: We have time available Monday,  
5 October 19th.

6 How long would you like the conference to go for?

7 THE COURT: We'll set it for most of the day. Is  
8 that day open?

9 THE CLERK: It is.

10 THE COURT: Does that day work for the United  
11 States?

12 MR. GORDER: Yes, Your Honor.

13 THE COURT: For Ms. Baggio?

14 MS. BAGGIO: Yes, Your Honor.

15 THE CLERK: So 10:00 a.m. through 5:00?

16 THE COURT: For now, yes. We won't use all that  
17 time but we'll use a fair amount of it.

18 And that means that in mid September, after we've  
19 had the *Daubert* hearing, you'll start filing witness lists,  
20 exhibit lists, motions in limine. We'll work through jury  
21 instructions and verdict form, anything like that, and we'll  
22 resolve those at the pretrial conference.

23 We have the Monday before trial to pick up any  
24 lingering issues in this trial.

25 Mr. Knight?

1 MR. KNIGHT: Judge, just to clarify, we have a due  
2 date then for the trial memorandum?

3 THE COURT: Well, I'm not giving you that now, but  
4 I'll send you what's called a trial management order that  
5 will give you all these dates, but it will be a series of  
6 dates beginning 30 days prior to the pretrial conference.

7 MR. KNIGHT: Thank you.

8 THE COURT: And, you know, a filing with a  
9 response, they begin to overlap as the month wears on, but  
10 they all get in on time for me to receive them all prior to  
11 the pretrial conference.

12 The case has taken some not surprising twists and  
13 turns in the production of discovery and the like, but we're  
14 fairly far down the road at this point. So I want to  
15 emphasize that I intend to hold this trial date. I think  
16 anything else, a month delay I think is bad for everybody,  
17 particularly the defendant, in terms of jury attention and  
18 the like, and a longer delay I think runs afoul of my own  
19 obligation under the Speedy Trial Act and the U.S.  
20 Constitution to hold a speedy and public trial. So I intend  
21 to hold everyone's feet to the fire on this trial date and  
22 make it work.

23 Anything further regarding scheduling from the  
24 United States?

25 MR. KNIGHT: Not scheduling, but we do have one

1 other issue, Your Honor.

2 THE COURT: Anything further on scheduling from  
3 the defense?

4 MS. BAGGIO: No, Your Honor.

5 THE COURT: Go ahead, Mr. Knight.

6 MR. KNIGHT: Thank you, Your Honor.

7 The Government would wish to raise an issue that  
8 was brought before the Court in the past few days, and that  
9 relates to the motions by the two attorneys from the ACLU  
10 that appear pro hac vice in this case. The government  
11 understands the Court has granted those motions. We feel  
12 obligated, however, to state on the record our concern that  
13 such an appearance not in an amicus fashion but as attorney  
14 of record -- as an attorney of record may create a conflict  
15 in this case.

16 Quite simply, our concern is this: that on its  
17 face, the ACLU has an interest. That interest may not be  
18 the interest of Mr. Khan. It is appearing in this case  
19 presumably to take a certain position in litigation about a  
20 statute and about the government's role in using that  
21 statute. That may indeed be different than the interests of  
22 the attorneys for Mr. Khan in the criminal case and what  
23 indeed may happen to Mr. Khan in a criminal case.

24 We raise that for the Court's concern,  
25 understanding, of course, the motion has been granted, but

1 we wanted to state our concerns on the record.

2 THE COURT: Thank you.

3 That's fairly often a concern when an  
4 institutional litigant with a litigation mission attempts to  
5 represent an individual, since it's not unusual for the  
6 individual's interests not to neatly match the institution's  
7 stated litigation interest nationally.

8 Here, I think, given their limited scope of  
9 representation, they actually line up fairly neatly, and in  
10 any event, that's a question I assume Ms. Baggio had thought  
11 about, more aware than I am how those may or may not match  
12 up, and decided they matched up well. So I continue to  
13 grant the pro hac vice request of the ACLU.

14 Any -- I asked a moment ago if you had anything  
15 more regarding scheduling. Do you have other issues you  
16 need to raise?

17 MS. BAGGIO: No, Your Honor.

18 THE COURT: All right. Thank you. We'll be in  
19 recess.

20 I am going to meet with Ms. Baggio in camera and  
21 ex parte regarding appointment of a replacement counsel.

22 So I'll have you come into chambers just to  
23 informally discuss who might be available out there.

24 MS. BAGGIO: Yes, sir.

25 THE COURT: Thank you.

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MR. KNIGHT: Thank you, Your Honor.

THE CLERK: This court is in recess.

(Proceedings concluded.)

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I certify, by signing below, that the foregoing is a correct transcript of the record of proceedings in the above-entitled cause. A transcript without an original signature or conformed signature is not certified.

/s/Bonita J. Shumway

1/2/2015

BONITA J. SHUMWAY, CSR, RMR, CRR  
Official Court Reporter

DATE